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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 302

HARRIET J. FABER, EXECUTRIX OF THE ESTATE OF HENRY B. FABER, DECEASED, AND ETHEL L. DRIGGS, EXECUTRIX OF THE ESTATE OF LOUIS L. DRIGGS, JR., DECEASED,

Petitioners,

vs.

TRIUMPH EXPLOSIVES, INC. AND GLENN L. MARTIN COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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vs.

TRIUMPH EXPLOSIVES, INC. AND GLENN L. MARTIN COMPANY.

PETITION FOR WRIT OF CERTIORARI.

Petitioners, Harriet J. Faber and Ethel L. Driggs, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit (R. 206), rendered on a re-argument reversing, in part, its prior decision (R. 180) and reversing the decision of the United States District Court for the District of Maryland (R. 60).

Opinions Below.

The finding as to facts and conclusions of law, and the opinion of the District Court, appear in the record on pages 60 to 90. The original opinion of the Circuit Court

of Appeals appears in the record on pages 180 to 190, and the final opinion, on re-argument, appears in the record on pages 196 to 206.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240A of the Judicial Code, as amended, under the Act of February 15, 1925, 28 U. S. C. A. 347. The judgment of the Circuit Court of Appeals, which the petitioners here seek reviewed, is dated May 19, 1942. The petition is, therefore, timely.

Questions Presented.

1. Does a disclaimer which adds no new element, but merely restricts the nature of one of the elements present in a claim, invalidate the claim?

2. Can a United States Letters Patent be held invalid on the grounds of prior publications where the publications relied on are foreign patents disclosing inoperative and incomplete devices?

3. Where a United States patent covers a device consisting of a combination of elements, ineffective separately, can said patent be invalidated by showing the elements separately in a series of foreign patents?

Statutes Involved.

The questions here presented involve the construction of the patent law, more particularly two sections thereof, R. S. 4886, 35 U. S. C. A. 31, and R. S. 4917, 35 U. S. C. A. 65, the relevant portions thereof being as follows:

R. S. 4886—Inventions Patentable.

> Any person who has invented * * * any new and useful art, machine, or composition of matter, or any

new and useful improvement thereof * * * not patented or described in any printed publication in this or any foreign country * * * may * * * obtain a patent therefor.

R. S. 4917—Disclaimer.

* * * and any such patentee, his heirs or his assigns * * * may * * * make disclaimer of such parts of the thing patented as he shall not choose to claim or to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent.

Statement.

This is an action involving infringement of three United States Letters Patent, issued to Louis L. Driggs and Henry B. Faber. Only two of the patents, No. 1,712,382 and No. 1,712,383, are involved in this proceeding. In the opinion of the court below they are referred to as the first and second patents.

The District Court held both these patents valid and infringed. The Circuit Court of Appeals, in its original opinion, held the first patent invalid and the second patent valid and infringed. Upon re-argument, the court held the second patent invalid.

The first patent covers a fire arm, and the second patent, fixed ammunition for the fire arm. These patents cover the Driggs-Faber system of pyrotechnics developed at the request of the United States Army.

The Army has taken a license under the patents and has operated under them since 1935. The Army has also licensed other manufacturers to make and sell equipment under the patents in suit for the United States Government, in addition to more than One Million Dollars worth of equipment embodying the patents in suit supplied by the Kilgore Manufacturing Company to the United States Government and commercial airlines (R. 77).

The claims in issue are claims 1 and 2 of the first patent, and claims 2 and 7 of the second patent. The respective patents, the devices and the need which they so successfully filled, are ably discussed in the opinion of the Circuit Court of Appeals, and, for the purposes of brevity, these subjects will not be repeated here.

The Court of Appeals holds the first patent invalid on two grounds. Claim 1 of the first patent reads as follows:

> "A muzzle loading low pressure fire arm, adapted to be used with fixed ammunition provided with a cartridge case, comprising a pistol grip, a short smooth bore barrel, spring actuated firing mechanism with a trigger for releasing same, and automatic means for holding the cartridge case in said barrel before and after firing, with means for releasing same from said barrel when desired."

On September 23, 1931, a disclaimer was filed restricting Claim 1 as follows:

> "By restricting the element 'cartridge casing' of said Claim 1 to 'closed at its rear end and capable of standing the strains of firing and ejecting completely a projectile therefrom without deformation of the cartridge casing'."

The Court held the disclaimer added an element to the claim and that the claim was, therefore, invalid and abandoned under the ruling laid down in *Altoona Theatres* v. *Tri-Ergon Corp.*, 294 U. S. 477. The Court further held the first patent invalid in view of the disclosures found in three French patents; the patent to Vaxelaire, No. 594,962 (R. 150), published September 24, 1925, and the patents to Rollet, No. 496,832 and No. 509,591 (R. 153-158), published on November 18, 1919 and November 13, 1920, respectively. The Court held the second patent invalid in view of the three French patents mentioned above, and the British patent to Wilder, No. 128,975, of July 10, 1919.

Your petitioners, Harriet J. Faber and Ethel L. Driggs, are the widows and the Executrixes of the Estates of Henry B. Faber and Louis L. Driggs, Jr., respectively, the co-inventors, and are the owners of the patents involved.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the disclaimer filed as to Claim 1 of the first patent in suit added an element to said claim.

2. In holding that the disclaimer filed in connection with the first patent in suit invalidated the claim.

3. In considering the Vaxelaire patent a complete disclosure or an operable device.

4. In considering the Vaxelaire patent as teaching anything.

5. In holding that the Vaxelaire and Rollet patents combined, taught the invention covered by the first patent in suit.

6. In holding that the Vaxelaire, Rollet and Wilder patents combined, taught the invention covered by the claims of the second patent in suit.

7. In holding that the various elements of the Vaxelaire and Rollet patents, if combined, would teach the invention covered by the first patent in suit.

8. In failing to affirm the decision of the District Court.

9. In reversing its own opinion upon rehearing.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals, reversing the decision of the District Court and its own decision, decides important questions of Federal law, to wit:

a) The effect of prior publications, incomplete in themselves, on the validity of United States Letters Patent.

b) The question of whether a disclaimer, which adds no new element, but merely restricts the nature of one of the elements recited in the claim, invalidates the claim.

2. The decision is in conflict with the decisions in other circuits and with the decisions of this Court so far as applicable.

3. The question of whether a disclaimer which restricts the claim without adding an element, is invalid, has not been determined by this Court.

4. The decision of the Circuit Court of Appeals deprived the owners of the patents the benefit of a substantial contribution to the national effort and constituted a miscarriage of justice.

WHEREFORE, it is respectfully submitted that this petition should be granted.

HARRIET J. FABER and
ETHEL L. DRIGGS,
By SPENCER B. MICHAEL,
Attorney for Petitioners.